sq. ft. as set out in their letter of 22 May 1984 to the plaintiffs' solicitors.

The defendants' claim is based on the plan annexed to the SSCT and in pursuance of clause 26 of the agreement.

The plaintiffs are resisting this claim. They say that the law is clear that if there is a misdescription against or to the prejudice of the vendor in that the property is greater than that stated in the contract, the vendor cannot claim by way of compensation or adjustment of the purchase price. Counsel for the plaintiffs cited a number of cases in support of this contention.

In the present case, however, under the agreement both parties have expressly agreed under clause 26 for an adjustment in the purchase price should there be a difference in the final area. This right extends to both the vendor and the purchaser. There is also a difference in the area for the ground floor based on the SSCT. The area in the SSCT is smaller than the area in the agreement for the ground floor and the defendants have made, and the plaintiffs have accepted, full compensation in the sum of $128,539.56.

The prices of the three units were not quoted in lump sums but were sold on a per square foot basis. The parties had agreed by clause 26 of the agreement to adjust the purchase price in the event of any difference in the area upon government resurvey of the unit on a per square foot basis and to submit themselves to the surveyed areas shown on certified plans approved by the Chief Surveyor and not any other surveyor. The area stated in the certified plans of the Chief Surveyor annexed to the SSCT is final.

In my view, the defendants are entitled to an adjustment and the purchase price of the mezzanine floor at $300 per sq. ft. should be increased by 571.88 sq. ft. amounting to $171,564.

In the result, the plaintiffs' application is dismissed with costs and there will be judgment for the defendants against the plaintiffs in the sum of $171,564 and costs.

Order accordingly.

Solicitors: *Shook Lin & Bok; Goh Choo Eng & Co.*

BRUNEI REPORT

NBT (BRUNEI) SDN. BHD. v. SYARIKAT LAJU MOTOR SDN. BHD.

[A.C.J. (Sears J.) 22 September 1987]

[Bandar Seri Begawan – Suit No. 389 of 1986]

Civil Procedure – Independent debt not satisfied – Method of satisfying judgment – R.S.C., O. 40 rr. 28 & 30.

The plaintiffs obtained judgment against the defendant company on 8 January 1987. That judgment was an ordinary regular judgment, nothing being said in the judgment as to when the judgment debt should be paid. However, when the judgment debt was not satisfied, the plaintiffs issued a judgment debtor summons. This is the procedure provided for in the Rules of the Supreme Court in Order 40 rule 30. The court made an order on 8 June 1987 that the judgment debt be paid in instalments.

The plaintiffs applied for leave under Order 40 rule 28 of the Rules of the Supreme Court. The Chief Registrar refused leave and the present appeal was made *ex parte*. The plaintiffs submitted that although application for leave was stated as made under Order 40 rule 28, for all practical purposes it was also made pursuant to Order 40 rule 30(4).

Held, dismissing the appeal: (1) leave is required from a court when the judgment is to be enforced under Order 40 rule 28 and leave is given when it is clear that there has been wilful disobedience by a party to such a judgment or order;

(2) the provisions of Order 40 rule 30 permit the examination of judgment debtors and the subsequent making of an order. Within Order 40 rule 30 is found the method of enforcement of that order. No leave is required if a party disobeys, for example, an instalment order. Although the plaintiffs have obtained an instalment order against the company, they have not sought to make an application under rule 30(4);

(3) the present application was simply an application for leave under Order 40 rule 28. The court cannot find any judgment or order made against the defendant company which has been wilfully disobeyed;

(4) leave to appeal was refused.

APPEAL FROM REGISTRAR'S DECISION.

Irene Appaduray (Ms) for the plaintiffs.

Cur. Adv. Vult.

Sears J.: This is an appeal against the decision of the Chief Registrar refusing leave under Order 40 rule 28 of the Rules of the Supreme Court. The application before the Chief Registrar was made *ex parte* as is this appeal before me. The factual background to the application is short.

The plaintiffs obtained judgment against the defendant company on 8 January 1987. That was

an ordinary regular judgment, nothing being said in the judgment as to when the judgment debt should be paid. In normal circumstances, therefore, the enforcement of that judgment can be carried out in one of the ways which is set out under Order 45 rule 1 of the Rules of the Supreme Court of England and, of course, the remedy of winding up, except that Order 45 rule 5 would not apply because there was no time specified in the judgment of the court when the money should be paid.

Mrs. Appaduray, for the plaintiffs, who has given the court every assistance on this matter and provided a number of authorities and submissions in a written form, accepts this position.

The plaintiffs, however, when the judgment debt was not satisfied, issued a judgment debtor summons which was heard on 8 June 1987. This is the procedure provided for in the Rules of this Supreme Court in Order 40 rule 30. It corresponds generally with the procedure available in England in the county court. This rule permits the judgment debtor to be examined and an order can be made for payment of the judgment debt by instalments. Further, it is clear from this rule that it does not matter whether the judgment debtor is a private individual or a corporation.

Order 40 rule 30 reads:

"Where a judgment or order is for the recovery or payment of money, the party entitled to enforce it may, without any application to the court, summon the debtor liable under such judgment or order (or, if such debtor is a corporation, an officer of that corporation) to be orally examined, *etc.*"

The plaintiffs did issue such a debtor summons which was heard on 8 June 1987 but the defendant company did not appear. I have examined a copy of that summons that was issued. It is a summons issued solely to the company; it is not issued at all to the directors, although I am told that the summons was served on them.

The court, therefore, made an order on 8 June 1987 that the judgment debt of $383,447 should be paid by monthly instalments of $5,000 each, first to be paid on 30 June and subsequently on the 30th of each month. Apparently such an order was made although the company did not appear, because the plaintiffs provided the court with some evidence mainly as to offers which had been made by the defendant and the court presumably based its decision on that evidence. No payments were made under that instalment order and by Order 40 rule 30(4), one finds if any order made under rule 30(3) is disobeyed, the party entitled to enforce it may summon the debtor to show cause why he should not be attached and committed to prison for contempt of court. Again this is a standard form of procedure which permits the court to take action when its order has been wilfully disobeyed.

Mrs. Appaduray, in her submission, says that the application for leave was stated as made under Order 40 rule 28 but, for all practical purposes, it was also made pursuant to Order 40 rule 30(4). In my judgment, there is a fundamental flaw in Mrs. Appaduray's approach in this matter. Leave is required from a court when the judgment is to be enforced under Order 40 rule 28 and leave is given when it is clear that there has been wilful disobedience by a party to such a judgment or order. It is not necessary to give examples because the matter is clear.

So far as a money judgment is concerned, there is no wilful disobedience unless the judgment itself specifies in clear terms that the judgment debt should be paid within a prescribed period. Mrs. Appaduray, however, submits that as there has been a subsequent judgment debtor summons and the company has defaulted in payment of that, then the company has wilfully disobeyed a judgment or order against it. In my judgment, I do not agree with that.

The provisions of Order 40 rule 30 permit the examination of judgment debtors and the subsequent making of an order. Within Order 40 rule 30 is found the method of enforcement of that order. No leave is required if a party disobeys, for example, an instalment order. Although the plaintiffs have obtained an instalment order against the company, they have not sought to make an application under rule 30(4).

I am not encouraging Mrs. Appaduray to make an application under rule 30(4). That is a matter essentially for her but it appears to me that what should have happened in this case is that the officers of the company should have been summoned to court and the procedure is available whereby they can be compelled to attend.

At that hearing, they can be examined as to the state of finance of the company and indeed an order can be made which demonstrates that the company is able to pay a certain sum of money and a specific order could be made. Although the order would, of course, be against the company, there is no doubt on the authorities that the

directors can be personally liable for the default of the company. I do not refer to the multiplicity of authorities which demonstrates that the officers of the company are responsible for the conduct of the company. If therefore an order under rule 30(4) is disobeyed, the directors can be summoned to show cause why they should not be committed to prison for contempt of court.

The matter before me, however, is simply an application for leave under Order 40 rule 28 I cannot find any judgment or order made against the defendant company which has been wilfully disobeyed. In those circumstances, I dismiss this appeal.

Mrs. Appaduray also asked for leave to appeal. I refuse her leave.

Appeal dismissed.

Solicitors: *Shelley Yap & Irene Appaduray.*

A MALAYSIAN REPORTS

HAJI LAUGAN TARKI BIN MOHD. NOOR v. MAHKAMAH ANAK NEGERI PENAMPANG

[S.C. (Salleh Abas L.P., Seah & Hashim Yeop A. Sani S.C.JJ.) 11 February & 14 March 1988]

B [Kuching – Supreme Court Civil Appeal No. 27 of 1988]

Native Law and Custom – Offence of slander or making false and defamatory allegations – Whether triable in Native Court – Breach of native law or custom – Native Court has no jurisdiction over act which constitutes an offence under the Penal Code – Power to impose prison sentence must be authorized by federal legislation – Whether certiorari lies against decision of Native Court – Provision for appeals not a bar – Native Courts Ordinance, ss. 5, 7 & 10(a) – Penal Code, s. 2 – Federal Constitution, Ninth Schedule, List IIA.

Administrative Law – Application for leave to issue certiorari to quash decision of Native Court – Provision for appeals – Whether a bar – Native Courts Ordinance, ss. 5, 7 & 10(a) – R.H.C. 1980, O. 53.

In this case, the appellant had been convicted and sentenced by the Penampang Native Court to one month's imprisonment for the offence of slander or making false and defamatory allegations against one James Ligunjang. He applied for leave for an order of certiorari to quash the decision. The learned judge of the High Court refused leave under Order 53 of the Rules of the High Court 1980 and in his grounds of decision stressed the elaborate appeal provisions contained in the Native Courts Ordinance. The appellant appealed.

Held, allowing the appeal: (1) the existence of an elaborate appeal provision in the law concerned is not a conclusive ground to refuse leave for an order of certiorari. The court has a discretion to issue an order of certiorari if it can be shown that there is lack of jurisdiction or there is a blatant failure to perform some statutory duty or there is a breach of natural justice;

(2) the underlying principle is that the jurisdiction of the High Court to grant an order of certiorari is supervisory in character and is exercisable over all inferior tribunals. The Native Courts are creatures of statute and the High Court can exercise control over Native Courts through the prerogative writs;

(3) it cannot be the intention of the Native Courts Ordinance to allow the Native Court to assert jurisdiction over an act which constitutes an offence under the Penal Code as the Ordinance gives no definition or guidance as to the meaning of "breach of native law or custom";

(4) the power to impose a prison sentence under section 7 of the Native Courts Ordinance as opposed to the power to award compensation can only be authorized by federal legislation to be passed in accordance with Item 13 of List IIA of the State List in the Federal Constitution;

(5) the Penampang Native Court in this case therefore acted without or in excess of jurisdiction when it imposed the sentence of imprisonment on the appellant. The appeal must therefore be allowed and the decision of the Native Court quashed and the conviction and sentence set aside.